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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re BENJAMIN R., a Person Coming Under  
the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

RUTH B.,

Defendant and Appellant.

B260783

(Los Angeles County  
Super. Ct. No. DK01486)

APPEAL from an order of the Superior Court of Los Angeles County,  
D. Zeke Zeidler, Judge. Reversed and remanded with directions.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel,  
and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Law Office of Gina Zaragoza and Gina Zaragoza, under appointment by the Court  
of Appeal, for Defendant and Appellant.

## **INTRODUCTION**

Ruth B. (mother) appeals the juvenile court's jurisdictional findings and dispositional order with regard to her infant son, Benjamin R. Benjamin's father, William R. (father) has a history of alcohol abuse and domestic violence against mother when he is intoxicated. After participating in family maintenance services with the Los Angeles County Department of Children and Family Services (DCFS) and apparently abstaining from alcohol use for several months, father relapsed and tested positive for alcohol on August 29 and October 23, 2014. As a consequence of father's relapse, the juvenile court made findings and an order with regard to both father and mother.

Mother appeals, challenging (1) the juvenile court's jurisdictional findings that she knew or reasonably should have known of father's alcohol use and failed to protect Benjamin, and (2) the court's dispositional order that mother attend Al-Anon and individual and conjoint counseling.

We reverse the jurisdictional findings as to mother, concluding that there is no substantial evidence that mother knew or should have known that father had relapsed. We also reverse the dispositional order as to mother, which appears to have been based on the court's jurisdictional findings. On remand, we direct the juvenile court to conduct a new hearing and make a new dispositional order as to mother, consistent with the views expressed in this opinion and any new information available to the juvenile court since the original dispositional hearing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Mother and father have been married for 12 years and have three children: D.R. (born June 2005), Abigail (born July 2007), and Benjamin (born June 2014).<sup>1</sup> Father works on-call jobs and is the sole financial provider for the family.

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<sup>1</sup> Only Benjamin is the subject of this appeal.

## **I.**

### **Prior Dependency Proceedings**

In May 2013, prior to Benjamin's birth, the family began receiving voluntary family maintenance services after allegations of neglect were substantiated against father. Father participated in substance abuse and domestic violence programs, and mother participated in a support group for victims of domestic violence.

On September 17, 2013, father became intoxicated and engaged in a violent altercation with mother, injuring her. D.R. and Abigail were placed with mother and detained from father, who was required to leave the home. Subsequently, the juvenile court sustained a petition on behalf of D.R. and Abigail pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b).<sup>2</sup> The petition alleged: Father "kicked the mother's face, inflicting bruising to the mother's eye and redness to the mother's forehead," thus endangering the children's physical health and safety and placing them at risk of harm (a-1, b-1); and father "has a history of substance abuse and is a current abuser of alcohol, which renders the father incapable of providing regular care or supervision of the children" (b-2). No allegations were sustained against mother.

The court ordered mother to participate in parenting classes, a domestic violence victim's support group, and individual counseling; it ordered father to participate in parenting and domestic violence classes, individual counseling, drug/alcohol testing, and a 12-step program.

By May 14, 2014, mother had completed all of her court-ordered activities, and father was in partial compliance. The court allowed father to return home and ordered custody of the children restored to both parents.

## **II.**

### **Present Detention**

Mother gave birth to Benjamin in June 2014. On August 29, 2014, father tested positive for alcohol.

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<sup>2</sup> All subsequent undesignated statutory references are to the Welfare and Institutions Code.

DCFS held a meeting with both parents on September 11, 2014. Father reported that the week he tested positive, he had been sick with the flu and had taken Advil, which he believed may have caused the positive result. Mother said she had not observed father under the influence of alcohol, and that if she believed father had begun drinking again, she would have notified DCFS or her family preservation counselor, Ms. Barajas, because her “children come first.” Mother said she would not hide anything because she knew her children could be detained from her.

Ms. Barajas, who was present at the meeting, reported that she had not seen any indication that father had been under the influence of alcohol during her weekly visits, and she confirmed that she had seen father sick with the flu the week he tested positive for alcohol. Ms. Barajas said the parents were always cooperative, and she had no concerns for the children’s safety.

Father said participating in court-ordered programs had helped him stay sober and be a better father and husband. He said he had learned a lot and would not risk losing his family again.

DCFS told the parents that given the progress they had made and mother’s demonstrated ability to protect the children, the children would not be detained at that time. However, both parents were advised that the children would be detained if father were to test positive again.

On October 15, 2014, father’s therapist reported that he had terminated sessions because father had met his treatment goals. Specifically, the therapist believed father had decreased depressive symptoms and improved his communication skills. The therapist believed father had made substantial progress and was no longer in need of therapy.

On October 23, 2014, father had another positive test for alcohol.

DCFS met with the parents on October 28, 2014. When the CSW told them of father’s positive test, both parents began to cry. Mother said she had not been aware father was drinking, saying, “I would never place my children at risk. . . . [M]y children come first and if I had seen him drunk in the home I would report it, but I haven’t. If he

needs to leave the house for me to keep my children, then he can leave. I will even get a divorce if that is what it takes.”

Father initially denied any alcohol use, but subsequently admitted drinking alcohol. He explained that he had been feeling anxious about his job and his inability to pay rent. The night before the test, he bought three 24-ounce beers after work and drank them before returning home at about 1:00 a.m. He said mother did not notice he had been drinking. Father said he did not want the children to be removed from mother and was willing to move out of the home.

DCFS detained the children on October 29 and placed them with their maternal aunt. DCFS recommended that the children remain detained from both parents, explaining that although mother said she had not seen father drink alcohol, “given the father’s statements and mother’s financial dependence [on] the father as well as the history of the case, it is unlikely this statement [is] true. DCFS believes that [mother] reasonably should have known of the father’s chronic substance abuse and failed to report it, therefore placing her children at risk.”

### **III.**

#### **Petition**

On November 3, 2014, DCFS filed a section 300 petition on behalf of Benjamin, and filed a separate petition under section 387 (order changing or modifying a previous order by removing a child from parent’s physical custody) on behalf of D.R. and Abigail. As subsequently amended, the section 300 petition alleged that father had a history of substance abuse and was a current abuser of alcohol, and that mother “knew or reasonably should have known that the father was under the influence of alcohol . . . [and] failed to protect the child and allowed father to have unlimited access to the child.”

### **IV.**

#### **Detention Hearing**

On November 3, 2014, the court found a prima facie case for detaining D.R., Abigail, and Benjamin from both parents. The court ordered the children released to

mother on the condition that father leave the home; it stayed its order of release to mother pending DCFS's confirmation that father had moved out of the family home.

The CSW made an unannounced visit to the family's apartment on November 4, 2014. The CSW found no evidence that father still lived in the home, and so she released the children to mother's custody.

## V.

### Adjudication

The jurisdiction/disposition report, dated December 9, 2014, noted that the results of father's alcohol/drug tests were as follows: June 2014—one negative test, one no-show; July 2014—two negative tests; August 2014—three negative tests, one no-show, one positive test (August 29); September 2014—four negative tests; October 2014—three negative tests, one positive test (October 23).<sup>3</sup> The report said D.R. and Abigail both denied seeing father drink alcohol, and it recommended that the three children remain detained from father and placed with mother.

At the December 9, 2014 adjudication hearing, mother's counsel asked that mother be declared a non-offending parent as to all three children. Mother's counsel noted that although mother was not contesting father's relapse, "I don't believe the Department can meet its burden by a preponderance of the evidence to show that mother either knew or even should have known that father had relapsed. [¶] Mother believed that father was actively participating in his case plan. Even the . . . family preservation worker who was interviewed indicated that . . . [father's relapse] was surprising to her. [She] had not observed him to be under the influence during home visits. [¶] So you have a professional who is actively in the home, older children and the mother all saying, look, we had no idea that dad had relapsed, and dad indicated that he would drink . . . very late at night, and mom and the children were asleep. [¶] Mother acted appropriately. . . . [¶] The mother participated with the Department in the [Team

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<sup>3</sup> The report also indicated a no-show on July 3, but said father was unable to test because the testing site closed early for the July 4th holiday.

Decision Meeting] and indicated if she had any . . . reason to believe father had relapsed, she would absolutely have him move out. Mother did have him move out. [¶] . . . And the mother I believe has indicated in her interview that she would even go as far as to divorce the father if that is what it would take in order to ensure the children's safety. [¶] And so I don't believe that the Department can meet [its] burden that mother either knew or should have known."

The children's counsel joined mother's request, noting that, "I do believe that the father made active efforts to hide his drinking from mother. And I'm not seeing much to support that the mother actually knew about his drinking."

DCFS disagreed and requested that mother be included in the petition, noting that "[i]f mother truly didn't know, . . . she reasonably should have known that this was occurring in the home, specifically since father had a positive toxicology for alcohol on August 29th, 2014."

The juvenile court sustained the jurisdictional allegations concerning father as to all three children, but sustained the jurisdictional allegations concerning mother as to Benjamin only. The court explained its order as follows: "Regarding the [section] 387 petition from November 3rd as to the older two kids, [¶] . . . [¶] . . . I'm further amending it to conform to proof [and finding] the 387 true as amended by the Department and further amended by me to conform to proof taking the mother out of the count. [¶] On the [section] 300 petition, the court finds by a preponderance of the evidence [that] counts 300 (b) and (j) are true as they've been amended, period. The child came in under 300. The previous alcohol issues and domestic violence and the mother's knowledge back then of those issues, it's all one big bundle. And so the mother is in the 300 count as to the new child, but not as to the 387 count on the siblings."

The court ordered all three children removed from father and placed with mother, who was ordered to attend Al-Anon, conjoint counseling with father if the parents intended to remain together, and individual counseling to address case issues, including having a partner with alcohol issues and the effects of alcohol on the family.

Mother timely appealed.

## **DISCUSSION**

Mother contends that (1) the juvenile court's jurisdictional finding that mother knew or should have known of father's drinking was not supported by substantial evidence, and (2) the court's dispositional order that she attend Al-Anon and individual and conjoint counseling was an abuse of discretion.

DCFS responds that mother's appeal is nonjusticiable and should be dismissed. Alternatively, it urges that substantial evidence supported the juvenile court's jurisdictional finding, mother forfeited the right to challenge the court's dispositional order, and the dispositional order was not an abuse of discretion.

As we now discuss, we exercise our discretion to consider the merits of mother's jurisdictional challenge, and conclude that the juvenile court's jurisdictional finding as to mother was not supported by substantial evidence. We also reverse the dispositional order as to mother and return the matter to the juvenile court for it to exercise its discretion in light of the views expressed in this opinion and any relevant new evidence.

### **I.**

#### **We Exercise Our Discretion to Consider The Merits of Mother's Jurisdictional Challenge**

DCFS notes that while mother challenges the sufficiency of the evidence as to her conduct, she makes no challenge to the jurisdictional findings against father. DCFS therefore argues that mother's jurisdictional challenge is nonjusticiable and should be dismissed. Given the circumstances of this case, we exercise our discretion to address the merits of mother's jurisdictional challenge.

DCFS is correct that because there is no challenge to the jurisdictional findings concerning father, the juvenile court's exercise of jurisdiction over Benjamin was proper. (E.g., *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 [“[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring [the minor] within one of the statutory definitions of a dependent.”].) For this reason, we may decline to address the evidentiary support for any remaining jurisdictional findings. (See *In re Briana V.* (2015) 236 Cal.App.4th 297,

308.) Alternatively, however, we may exercise our discretion to address the merits of the jurisdictional finding against mother. (*Id.* at p. 309.)

An appellate court “generally will exercise [its] discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other consequences for [the appellant], beyond jurisdiction’ [citation].” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 (*Drake M.*)). In *Drake M.*, even though there was no challenge to the jurisdictional findings as to the mother, the appellate court elected to review the merits of the father’s challenge to the single jurisdictional finding as to him because “the outcome of this appeal is the difference between father being an ‘offending’ parent versus a ‘non-offending’ parent. Such a distinction may have far-reaching implications with respect to future dependency proceedings in this case and father’s parental rights.” (*Id.* at p. 763.)

The present case is analogous to *Drake M.* The outcome of this appeal will determine whether mother is an “offending” parent or a “non-offending” parent. Such a distinction may impact mother in the existing dependency case relating to siblings Abigail and D.R., and it may have far reaching implications with respect to future dependency proceedings and mother’s parental rights. Further, mother contends the juvenile court’s dispositional order is based on the section 300 allegations and constitutes an abuse of discretion. (*Drake M., supra*, 211 Cal.App.4th at p. 763.) We therefore exercise our discretion to address the merits of mother’s challenge to the jurisdictional finding.

## **II.**

### **The Trial Court’s Jurisdictional Finding with Respect to Mother Is Not Supported by Substantial Evidence**

Mother challenges counts b-1 and j-1, which allege that mother “knew or reasonably should have known that the father was under the influence of alcohol,” and therefore failed to protect Benjamin.

“We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible.” (*In re David M.* (2005) 134 Cal.App.4th 822, 828; *accord, Drake M., supra*, 211 Cal.App.4th at p. 763; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) “ ‘[S]ubstantial evidence is not synonymous with *any* evidence. [Citations.]’ ” (*In re David M., supra*, 134 Cal.App.4th 822, 828.) “ ‘While substantial evidence may consist of inferences, such inferences must rest on the evidence; inferences that are the result of speculation or conjecture cannot support a finding. [Citation.]’ [Citation.]” (*In re A.G.* (2013) 220 Cal.App.4th 675, 683.)

The present record does not support the juvenile court’s conclusion that mother knew or reasonably should have known that father had resumed drinking. With regard to the October 23, 2014 positive test, the evidence before the juvenile court was that father arrived home at approximately 1:00 a.m. the morning before the test after drinking three beers outside of the home. The record does not provide any evidence that father was noticeably inebriated, or that mother was awake or had the chance to observe father’s conduct when he arrived. To the contrary, both father and mother said mother did *not* notice father’s inebriated state. Further, Abigail and D.R. provided statements that they had not seen their father drink, the family preservation counselor had not observed any indicators of father’s relapse during her weekly visits, and the children’s attorney agreed that there was not much to support the allegation that mother actually knew about father’s drinking the night before the October 23, 2014 positive test.

Further, notwithstanding the earlier positive test in August 2014, DCFS’s involvement with the family would have given mother good reason prior to October 28 to have confidence that father had *not* relapsed. Father had been submitting to weekly drug tests since June 2014, and mother had been advised of only one positive test, based on the sample drawn on August 29, 2014. The repeated negative tests reasonably would have given mother confidence that father was not drinking. As for the August 29 test, father had attributed the positive result to Advil he had taken for the flu, and the caseworkers

had credited his explanation. Since DCFS apparently found it credible for Advil to have been the cause of the positive test, mother could not reasonably have been expected to know otherwise.

For all of these reasons, there was no substantial evidence to support the jurisdictional findings that mother knew or should have known of father's drinking and failed to protect Benjamin. (*In re Briana V.*, *supra*, 236 Cal.App.4th at p. 309.)

### **III.**

#### **We Remand to the Juvenile Court for Reconsideration of the Dispositional Order As to Mother**

Mother contends that the dispositional order requiring her to attend Al-Anon meetings and individual and conjoint counseling is an abuse of discretion because nothing in the record suggests she was in need of any services to assist her in protecting her children. She also suggests the dispositional order is unduly burdensome.

As an initial matter, we reject DCFS's contention that mother forfeited the right to contest the dispositional order by failing to object to it in the juvenile court. We note that mother's counsel specifically requested that mother be declared a non-offending parent, and she urged that substantial evidence did not support a finding that mother knew or should have known of father's alcohol use. Once the juvenile court rejected mother's assertion that she did not know father had relapsed, any further objection to the dispositional order that flowed from that factual finding would have been futile. In those circumstances, mother has not forfeited her arguments on appeal. (See *In re Daniel B.* (2014) 231 Cal.App.4th 663, 672-673.)

On the merits, we agree with mother that the juvenile court's finding that she knew or should have known of father's alcohol use formed the basis for the dispositional order, and therefore the dispositional order must be vacated. However, we do *not* agree with mother that having stricken the jurisdictional finding as to mother, the dispositional order necessarily constituted an abuse of discretion. Indeed, even in the absence of a jurisdictional finding, the juvenile court would have had the discretion to make a dispositional order as to mother. As one court has explained: "The juvenile court may

make ‘all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child.’ (§ 362, subd. (a); *In re Jasmin C.* (2003) 106 Cal.App.4th 177, 180.) The problem that the juvenile court seeks to address need not be described in the sustained section 300 petition. (See *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006-1008.) In fact, there need not be a jurisdictional finding as to the particular parent upon whom the court imposes a dispositional order.” (*In re Briana V.*, *supra*, 236 Cal.App.4th at p. 311; see also *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [“A jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent, once dependency jurisdiction has been established”].)

The juvenile court “has broad discretion to determine what would best serve and protect the child’s interest and to fashion a dispositional order in accord with this discretion.” (*In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1006.) Because we cannot know what dispositional order the juvenile court would have made had it found mother did not know or have reason to know of father’s alcohol use, we vacate the dispositional order as to mother and remand to the juvenile court to conduct a new dispositional hearing and enter a new dispositional order. In exercising its discretion with regard to the new dispositional order, the juvenile court should consider section 362 and related provisions, the conclusions we have reached in this opinion, and any new information available to the court since the original proceeding. We express no opinion as to the appropriateness of any particular dispositional order on remand.

## **DISPOSITION**

The December 9, 2014 order is reversed insofar as it sustained allegations and made a dispositional order as to mother. On remand, we order as follows:

(1) The juvenile court shall strike the following language from counts b-1 and j-1 of the sustained petition: “The child’s mother, Ruth [B.] knew or reasonably should have known that the father was under the influence of alcohol. The mother failed to protect the child and allowed the father to have unlimited access to the child.” In addition, in the last sentence of counts b-1 and j-1, the trial court shall strike the words “and the mother’s failure to protect the child.”

(2) The juvenile court shall conduct a new dispositional hearing and make a new dispositional order concerning mother consistent with Welfare and Institutions Code section 362 and related provisions, the views expressed in this opinion, and any new information available to the juvenile court since the original dispositional hearing.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

KITCHING, J.

JONES, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.